IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 414 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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KESHAVBHAI POSALBHAI DHODHI PATEL & 2 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR JB PARDIWALA for Appellant(s) : 1 - 3.
MR KT DAVE, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 17/06/2006

ORAL JUDGMENT

1. This Appeal is filed against the judgment and order of conviction and sentence passed by the learned Sessions Judge, Valsad at Navsari in

Sessions Case No.188 of 1998. The learned Sessions Judge at the conclusion of the trial held all the four appellants (hereinafter referred to as 'the accused') guilty of the offence punishable under Sections 325 and 34 of the Indian Penal Code and they have been sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1000/-.

2. To appreciate the stand taken by the appellant-State and the judgment and order of acquittal under challenge, we would like to state the case of the prosecution placed before the learned trial Judge in brief. The brief facts of the prosecution case are mentioned in paragraph no.2.1 of the memo of the appeal and for the sake of brevity and convenience, we would like to reproduce as under :

> “2.1 The first informant is the wife of the deceased and is residing at village Borigam. On 13.7.1998 at about 11-30 in the morning

the deceased lodged an FIR at Umargam Police Station in connection with the incident which took place on the very same day at about 4 O'clock in the early morning. According to the first informant the deceased on the date of incident had gone to answer nature's call at about 4 O'clock in the early morning. The first informant was in her house and at that point of time the first informant heard some shouts and accordingly the first informant came out of the house and found that accused nos.1, 2, 3 and 4 armed with axe, iron rod and wooden stick were assaulting the deceased mercilessly. According to the first informant accused no.1 had an axe in his hand, accused no.2 had an iron rod in his hand, accused no.3 had an axe in his hand and accused no.4 had a stick in his hand. According to the first informant indiscriminately blows were inflicted on the whole of the body

of the deceased. The first informant tried to intervene to save the deceased but she also was asked to stay away or else the first informant would also have been beaten. After some time all the four accused persons ran away. First informant found that the deceased was lying down unconscious and was bleeding. Thereafter, the first informant is said to have left the deceased over there and is said to have gone to the house of her relatives and the Sarpanch of the village to inform about the incident. It is the case of the prosecution that there after few relatives came over there at the scene of occurrence including the Sarpanch and the deceased was shifted to Bhilad Civil Dispensary in an auto rickshaw of one Maheshbhai Ahir the course of treatment at about 10 O'clock in the morning the deceased passed away.

At about 11.30 in the after

noon FIR was registered in the hospital. After post mortem examination the cause of death which was revealed was Haemothorax and Haemorrhagic shock which means collection of blood in the space between the lungs and chest wall (pleural cavity).”

3. Mr.J.B. Pardiwala, learned counsel appearing for the appellants, has taken me through the judgment and order of conviction and sentence under challenge and various grounds agitated in the memo of the appeal and it is argued that the judgment and order of conviction and sentence is bad and illegal and on the strength of the evidence led by the prosecution. It is stated that the accused ought not have been held guilty for any offence. The accused initially were charged for the offence punishable under Section 302 r/w. Section 34 of the Indian Penal Code. But it is observed by the learned trial Judge that the prosecution has not successfully established the charge of offence of murder

punishable under Section 302 of the Indian Penal Code but there is sufficient evidence to link the accused with the offence punishable under Section 325 r/w. Section 34 of Indian Penal Code.

4. In response to the query raised by the Court, the learned Additional Public Prosecutor Mr.K.T.Dave has submitted that the State has not preferred any appeal against the judgment and order of acquittal recorded by the learned trial Judge qua the offence punishable under Section 302 of the Indian Penal Code, otherwise the present appeal could have been tagged with the acquittal appeal of the State. Obviously, therefore, this Court shall have to appreciate whether the finding of the learned trial Judge holding the accused guilty of the offence punishable under Section 325 r/w. Section 34 of the Indian Penal Code is sustainable in the eye of law or not. I have been taken through the oral as well as documentary evidence led by the prosecution and mainly the evidence of witnesses who had

allegedly either seen the incident or rushed to the site of the incident after couple of minutes or hours of the incident. The deposition of the Investigating Officer is also found relevant and, therefore, the relevant part of the deposition of the police officer who has investigated the crime is also read over to me by the learned counsel appearing for the appellants. If the Court adopts the main reasons assigned while acquitting the accused from the charge of the offence punishable under Section 302 of the Indian Penal Code, then the same reasons can be used substantially by this Court while evaluating the correctness of the decision under challenge. Only one person i.e. the complainant-wife of the deceased has claimed that she had seen the incident. So the case of the prosecution is based on solitary eye-witness. The use of axe by any of the accused who were allegedly holding the axes in their hands as per the case of the prosecution i.e. orig.accused no.3-Chhitubhai Keshavbhai and

orig.accused no.4 Navinbhai Keshavbhai, has not been accepted by the learned trial Judge as no injury of the nature that could be inflicted by an axe was found on the body of the person deceased when the autopsy was performed by PW-3 Dr.Arvind Muljibhai Gori. Total 8 injuries were found on the body of the deceased during the autopsy; two of them of fracture and other injuries were simple in nature. The learned Sessions Judge has rightly observed that any of the external injuries found on the body of the person deceased had no nexus with the internal injury or collection of blood in the chest or chest cavity, and when the Doctor has opined that none of the external injuries was sufficient individually or all the injuries collectively to cause death of a person; none of the accused could have been linked with the offence punishable under Section 302 of the Indian Penal Code. The learned trial Judge has also observed that there is no direct evidence against any of the accused and it is difficult

from the evidence available on record as to who is the author of the injury causing fracture. In the same way, when the learned trial Judge has not held any of the accused responsible for the offence punishable under Section 323 of the Indian Penal Code, either individually or collectively by applying Section 34 or Section 114 of the Indian Penal Code, then this Court is supposed to evaluate the finding which is based on the appreciation of evidence led by the witness examined by the prosecution.

5. Mr.Pardiwala has advanced his arguments mainly on the following aspects :

(i) That the PW-1 complainant Manuben-wife of the deceased has posed herself to be the eye-witness of the incident but in reality, the learned trial Judge ought to have accepted her version as a version of an eye-witness. On the contrary, it emerges that she must have reached to the spot where her

husband was lying in an injured condition after a lapse of some minutes or hours.

(ii) Undisputedly, the incident has occurred in the early hours of the day on 03rd January, 1998. The accused persons had kept a watch on the movement of the deceased. It is true that if the deceased was leaving his house in the early morning everyday, then the accused can gather an impression that on the fateful day also, the deceased would come out from his house in the early hours and they would intercept him. But the motive placed by the prosecution in the Court is against one accused and no cogent evidence to prove the motive has been led to the satisfaction of the Court. On the contrary, it gives an impression that but for the motive that has been attributed by the complainant in her deposition

(paragraph no.6), she must have been tempted to involve all the four persons while informing the police otherwise it was possible for her to inform the name of assailants to the neighbours and her close relatives like Amratbhai Vansabhai, at the first available opportunity.

(iii) PW-2 Amratbhai Vansabhai examined by the prosecution is the real brother of the complainant-Manuben. It is the say of the prosecution that the complainant-Manuben had gone to the house of PW-Amratbhai and she informed Amratbhai that her husband has been assaulted and he is lying near her house. It is clear from the evidence of Manuben as well as Amratbhai that she has gone to the house of Amratbhai to seek help and assistance of Amratbhai so that the injured Shankarbhai can be shifted to the hospital and appropriate other steps

can also be taken. According to PW-Amratbhai, when he reached the spot, Shankarbhai (deceased) was lying in an injured condition near her house. He was lying unconscious and, therefore, he called one autorickshaw and he was shifted to Bhilad. That this injured victim Shankarbhai was not in a position (i.e. physical condition) to speak.

(iv) It is argued that if it was possible for Shankarbhai (deceased) to speak something and when it is not the case of complainant Manuben that her injured husband had informed her about number of assailants and names of assailants, then the complainant Manuben at the most could have unfolded the names of the accused persons when she had been to the house of Amratbhai. The learned trial Judge ought not have held that in this fact situation the complainant must have

seen the incident and she was able to identify the assailants with weapons in their respective hands.

(v) While giving history to the Doctor, it was possible for PW-Amratbhai and/or PW-complainant Manuben to state the names of assailants and then PW-Manuben could have got some corroboration from the hospital papers as to the involvement of the present appellants in the crime. So absence of corroboration makes the deposition of PW-Manuben doubtful and no Court could have linked the accused with the crime on account of inadequacy of evidence.

(vi) That as per the accepted proposition of law, the conviction can be based on sole testimony of the witness and there is no need to have any corroboration. But while applying this principle, the status of the witness, the conduct of the witness and the

relationship of the witness with the person deceased need consideration and if the Court finds that the witness is not unfolding the true story and he/she is playing a game of hide and sick or he/she is found to be partisan witness, then it would not be safe to base the case on the testimony of such a solitary eye-witness. So it is the Rule of Prudence that in such cases while scanning the evidence of such witness, the Court should seek some assistance in the nature of corroboration.

(vii) In the present case, when it is doubtful whether the PW-Manuben had seen the incident or not, it was obligatory on the part of the learned trial Judge to conclude positively that she had seen the incident and there is sufficient evidence to show that she is an eye-witness and only thereafter, her version as an eye-

witness could have been appreciated. It appears that the learned trial Judge while appreciating the oral evidence of Manuben has not considered this accepted proposition of law of Criminal jurisprudence. For the sake of brevity and convenience, this Court would like to reproduce the relevant portion of paragraph no.3 of the decision in the case of ***Anil Phukan vs. State of Assam, reported in AIR 1993 SC 1462,*** and the gist of Editor's note based on paragraph nos.4, 5 and 6 of the said decision given below head note reads as under, where the Apex Court has said that :

> **“A conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the Courts**

have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye-witness is a wholly reliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect.

Where the alleged single eye-witness being a close relative of deceased was an interested witness and though alleged to be present at place of occurrence but did not attempt to save deceased and also his statement about time of occurrence was contradictory to medical evidence, the

testimony of said eye-witness could not be relied upon for conviction of accused. Of course, mere relationship with the deceased is no ground to discard his testimony, if it is otherwise found to be reliable and trustworthy. In the normal course of events, a close relation would be the last person to spare the real assailant of his relative and implicate a false person. However, the possibility that he may also implicate some innocent person along with the real assailant cannot be ruled out and, therefore, it would not be safe to accept his evidence without some independent corroboration, direct or circumstantial."

(viii)The delay caused in filing the FIR also affects adversely to the strength of the case of the prosecution. The complainant Manuben has stated specifically in her deposition during cross-examination that she had given

her thumb impression in the complaint at about 04-00 p.m. on 13th January. The Court shall have to consider that aspect that registration of complaint should be and must be after 04-00 p.m. but surprisingly, the number of crime registered by the police is reflected in the Inquest Panchnama being C.R.No.I-108 of 1998 punishable under Section 302 and 34 of the Indian Penal Code drawn between 13-00 and 13-30 hrs. on 13th June, 1998.

6. In response to the query raised by the Court, Mr.K.T. Dave, learned Additional Public Prosecutor, has drawn the attention of the Court that report under Section 137 had not reached the learned Judicial Magistrate First Class on the next day i.e. on 14th June, 2006 and it was received by the learned Judicial Magistrate First Class only on 15th June, 206. It is not necessary to comment on the sane but it is the experience that in number of cases, the police has been criticized either by the

prosecutor or by the Court in preparing papers of investigation by putting date and time as per their convenience. When victim Shankarbhai was taken to Bhilad CHC (Community Health Centre), he was lying in the bed but Shankarbhai had died within one hour of his admission in the hospital and the cause of death is found as Haemothorax and Haemorrhagic shock. The learned trial Judge when has held that it is not possible to say that any of the accused is responsible for causing death of the Shankarbhai, then in absence of cogent and convincing evidence as to the involvement of the accused persons as to assailants, none of the accused could have been linked with the offence punishable under Section 325 of the Indian Penal Code also. It appears that two fracture injuries found on the body of the deceased, then the learned trial Judge ought to have convicted them for the said offence then of a murder.

7. One more argument advanced by Mr.Pardiwala is that it was not possible to watch the incident

or to see the assailants by the complainant Manuben from her house as there was reasonable good distance, if early hours of the day are considered, between the complainant Manuben and the place of incident. The map prepared by Revenue Circle produced vide Ex.27 indicates that there is one bus-stop in between the house of the complainant and the place where injured Shankarbhai was lying. But the electricity pole shown in the map is also at a reasonable good distance and that too on the opposite side of the road as shown in the map. There is no evidence that there was municipal or panchayat lamp fixed on that pole. On the contrary, it is the say of complainant Manuben that because of the light which was there in her house, she had seen the incident in question.

8. I have appreciated the above arguments and they are found convincing as the same are based on accepted principles of law and on the oral as well as documentary evidence led by the prosecution during the trial. It appears

that the learned trial Judge has grossly erred in linking the accused with the act of assault. There is no sufficient or legal evidence available on record even to say that the present appellants had assaulted Shankarbhai. On the contrary, it appears that as the wife of the deceased was not able to name the actual assailants and the cause for the assault, she has implicated the appellants in a serious crime. On certain doubts and suspicions, which were in her mind, since some strange relations were brought to her notice on hearse evidence between the accused no.3-Chhitubhai and her daughter-in-law (second son's wife).

9. So in view of above observations and discussion, the appeal is required to be allowed and hence, the same is hereby allowed and the judgment and order of conviction and sentence is hereby quashed and set aside and all the accused persons are acquitted from the charge of the offence punishable under Section 325 r/w. Section 34 of the Indian Penal Code.

The amount of fine, if paid, be refunded to the respective accused. The bail bond, if any, stands cancelled. The Registry shall now send a Yadi to the concerned Sessions Court forthwith.

(C.K. Buch, J)

Aakar